Appendix A

December 31, 1963

Filed Jan 7—1964 C. C. LaRue, Clerk
Graham, James & Rolph
Robert D. McKenzie
Raymond A. Greene, Jr.
Attorneys at Law
310 Sansome Street
San Francisco 4, California

Stanley Mosk
Attorney General
State Building
San Francisco 2, California
ATTN: John F. Klee, Jr.
Deputy Attorney General

Re: Shell Oil Company vs. State Board of Equalization of the State of California, and The State of California, No. 95,851

Gentlemen:

This case presents a rare opportunity for a trial court to deliver itself of an earth shaking opinion, but since this trial court lacks both time and a staff of research assistants it will set forth its views in letter form with only such detail as may be required for the preparation of findings.

At the outset I wish to compliment counsel on both sides for their exhaustive treatment of the issues in the briefs and on oral argument and to thank them for having presented the court with a transcript of the oral arguments.

After reviewing the stipulated facts and the briefs and arguments and having considered and read most of the cited authorities, I am persuaded that the tax in question

is valid and constitutional with respect to each of the four grounds upon which it has been assailed by the plaintiff.

(1) The tax is not a tax on an export.

In Swan & Finch vs. United States, 190 U.S. 143, the Court was interpreting a statute but stated that "export" under the statute meant the same thing that it meant in the constitutional provision. It concluded that intended arrival at a foreign destination was a necessary element and that oil consumed by a ship during the voyage could not be classified as an export.

In Richfield vs. State Board of Equalization, 329 U.S. 69, the oil sold and taxed was not bunker fuel but cargo. The Court held that delivery to the purchaser in San Francisco was as certain to result in the cargo's arrival at a foreign destination as delivery to a common carrier under an export bill of lading. Though Swan & Finch is not discussed, it seems to me that the Court found that the Swan & Finch condition of intended arrival at a foreign destination was satisfied in the Richfield situation. The same thing can be said of Matson vs. State Board of Equalization, 136 Cal App 2d 577, where the sales tax was applied to the sale of the ship itself. Under the circumstances of that sale the Court concluded that the Swan and Finch condition was satisfied because it expressly cited Swan and Finch for the proposition that intended arrival at the foreign destination is a necessary element of an export. A petition for hearing was denied by the California Supreme Court in the Matson Case. Since the very question before the District Court of Appeal was whether the foreign destination intention was satisfied in the Matson case and no cases saying that the requirement itself is unnecessary have been presented, it seems to me that this Court is bound to find in accord with the District Court's reference to the rule of Swan & Finch.

Since the bunker fuel was not sold with the intention that it reach a destination abroad, it was not an export.

(2) The tax is not invalid as the equivalent of a tax on the goods or as a tax on the export process.

When this phase of the case is discussed, it must be remembered that the "goods" and the process of exportation with which we are concerned involves the overseas shipment of cargo and not bunker fuel.

It is interesting to note that the Richfield opinion and the opinion of the Supreme Court of the United States in Canton R. Co. vs. Rogan, 340 U.S. 511, were both written by Mr. Justice Douglas. He points out the distinction between a tax on the goods themselves or its equivalent and a tax on "handling" them at the port and says at page 514 et seq:

> "An article may be an export and immune from a tax long before or long after it reaches the port. But when the tax is on activities connected with the export or import the range of immunity cannot be so wide."

Plaintiff insists that Mr. Justice Douglas is drawing a line at the waters edge with reference to "handling" cargo, but it seems to me that he is saying that some activities beyond the waters edge may be taxed without being invalid as a tax on the exportation process, depending upon who is engaged in the activity and who is being taxed. In the Canton case the gross receipts by which the tax was measured included rental of a crane owned by the taxpayer and which was used to transport cargo from the wharf of taxpayer to the ship which was to carry the cargo to its foreign destination. Mr. Justice Douglas stated at page 515:

> "Appellant claims that loading and unloading are a part of its activities. But close examination of the record indicates that it merely rents a crane for loading and unloading and does not itself do the stevedoring work. Hence we need not decide whether loading

for export and unloading for import are immune from tax by reason of the Import-Export Clause. Cf. Joseph vs. Carter & Weeks Stevedoring Co., 330 U.S. 422."

I am unable to conclude that the general sales tax of the State of California taxing the retailer on sales of bunker fuel made to ships engaged in foreign commerce is any more of a tax on the export process than the tax based in part, at least, upon gross receipts from rental of a crane which slings a load of cargo from dock to boat or vice versa.

(3) The tax in question is not invalid under the Commerce Clause.

It seems to me that the airlines cases relied upon by the Attorney General and the case of McGoldrick vs. Campagnie Generale, 309 U.S. 430, are controlling upon this feature of the case.

(4) Congress has not occupied the field with respect to sales of bunker fuels not involving imported components.

The Gulf Oil case, 309 U.S. 414, seems to me to indicate that the Federal Government has occupied the field with reference to imported and bonded oil which is processed and sold as ships stores, but not as to other types of bunker fuel such as that with which we are concerned.

In view of the foregoing it will be in order for Counsel for the Defendant Board to prepare findings and conclusions and form of judgment. I suppose the findings could incorporate the stipulated facts. I will be glad to discuss this feature if counsel so desires.

Yours very truly,

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Judge of the Superior Court

SWR:or

Filed Jan 29 1964 C. C. LaRue, Clerk
Stanley Mosk, Attorney General
of the State of California

Ernest P. Goodman
Deputy Attorney General

John J. Klee, Jr.
Deputy Attorney General

6000 State Building
San Francisco 2, California
Telephone: UNderhill 1-8700

Attorneys for Defendants

Superior Court of the State of California
for the County of Sacramento

No. 95851

Shell Oil Company, a Corporation,
Plaintiff,

v.

State Board of Equalization of the State of California, and the State of California,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the above-entitled Court, the Honorable Stanley W. Reckers, Judge, Presiding; Graham, James & Rolph by Robert D. MacKenzie, and Raymond A. Greene, Jr., appearing for plaintiff, and Stanley Mosk, Attorney General of the State of California, by Ernest P. Goodman, and John J. Klee, Jr., Deputies Attorney General, appearing for

defendant; the cause having been submitted on written briefs, the Court, having considered the evidence and being fully advised in the premises and having rendered its decision in favor of defendant and against the plaintiff, now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

The Court finds that the facts are as stated in the document on file herein titled, "Stipulation of Facts" and said Stipulation of Facts is hereby adopted as findings of fact of this Court.

II

The Court further finds that each and every allegation of the complaint which is not included in the Stipulation of Facts or admitted by the answer is untrue.

III

As additional Findings of Fact, drawn as inferences by the Court from the Stipulation of Facts, the Court finds as follows:

(a) The sales in question were local sales and were not in interstate or foreign commerce and the imposition of the tax in question does not impose a direct burden on interstate or foreign commerce.

(b) The bunker fuel here involved was not an export nor sold for exportation and the tax imposed on the retailer of said bunker fuel was neither a tax on an export nor a tax on the process of exportation.

CONCLUSIONS OF LAW

From the foregoing facts, the Court concludes:

I

The tax here involved does not violate Article I, Section 8, Clause 3 of the United States Constitution (Commerce Clause).

II

The tax here involved does not violate Article I, Section 10, Clause 2 of the United States Constitution (Import-Export Clause).

III

Congressional enactments do not expressly or impliedly prohibit taxation by the states of retailers of domestically produced bunker fuel and, therefore, the tax here involved does not violate Article VI, Clause 2 of the United States Constitution. (The Supremacy Clause).

IV

The application of the tax here involved was correct and valid in all particulars and in accord with the provisions of the Revenue and Taxation Code and was not violative of any provisions of the federal constitution or state constitution or any federal or state statutory provisions, and plaintiff is not entitled to a refund of any portion of the amount here in controversy.

V

Plaintiff shall take nothing by this action and defendant shall have its costs of suit incurred herein.

Judgment is to be entered accordingly.

Dated: January 28, 1964

/s/ STANLEY W. RECKERS
Judge of the Superior Court

In the District Court of Appeal of the State of California in and for the Third Appellate District

[Sacramento]

3 Civ. 10953

Shell Oil Company, a Corporation,
Plaintiff and Appellant,
v.
State Board of Equalization of the State of California, and the State of California,
Defendants and Respondents.

Filed: Sep 28 1965

In this tax refund suit Shell Oil Company challenges California's power to impose its retail sales tax on sales of "bunker" fuel oil for consumption on ships engaged in foreign and interstate commerce. As to sales made to ships of foreign registry and those engaged exclusively in foreign commerce, the tax is claimed to violate the "import-export clause" of the Federal Constitution.[1] Secondly, regardless of vessel registry, immunity from state taxation is urged under the interstate and foreign commerce clause of the Constitution.[2]

1. Article I, section 10, clause 2 of the Federal Constitution declares:
"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. . . ."

2. Article I, section 8, clause 3 of the Federal Constitution declares congressional power "To regulate commerce with foreign nations, and among the several States. . . ."

The case was submitted to the trial court on a stipulated set of facts. The trial court upheld the tax and Shell appeals. According to the stipulation, Shell sells "unbonded" bunker fuel oil as ships' stores to be consumed by the vessels in the course of the voyage. The vessels fall into three categories: (1) vessels registered in foreign countries and engaged in foreign commerce; (2) vessels registered in the United States and engaged in foreign commerce; (3) vessels registered in the United States and engaged in interstate commerce. Each sale was made under a master contract obligating Shell or one of its related companies to furnish fuel to the vessel in any part of the world. Delivery of the oil in question was made at various California ports. In some instances the vessels tied up and received fuel at a fuel dock operated by Shell, in others from a barge operated by Shell or its agent. Each vessel took on cargo at the California port at which it loaded bunker fuel. This cargo was then discharged at foreign or American ports outside California. The stipulation recites that the oil was indispensable to the voyage which followed its purchase and was actually consumed during the voyage. After delivery of the oil Shell submitted a bill to the operator of the vessel. In all cases except one the bill was submitted to a firm located outside California. In two cases the bill was submitted to firms located in foreign countries. In all cases Shell collected the California sales tax and has agreed to refund the tax to the buyers if successful in the present refund action.

Decisions marking the limits of state taxation under the import-export clause usually involve articles unquestionably destined for ultimate use or consumption in a foreign land. The question in such cases is not the article's ultimate character as an export, but whether the process of exportation is under way at the time of the tax incident. The import-

export clause prevents California from imposing a sales tax on articles sold within the state if at the time of sale the certainty of a foreign destination is plain. (Richfield Oil Corp. v. State Board of Equal., 329 U.S. 69, 82-83 (1946); Gough Industries v. State Board of Equal., 51 Cal.2d 746, 749 (1959); Union Oil Co. v. City of Los Angeles, 227 Cal. App.2d 608, 613-614 (1964); Matson Nav. Co. v. State Board of Equal., 136 Cal.App.2d 577, 583-584 (1955); see Empresa Siderurgica v. County of Merced, 337 U.S. 154, 157 (1949); A. G. Spalding & Bros. v. Edwards, 262 U.S. 66, 69-70 (1923).)

The initial problem here is not whether the process of exportation has been commenced or completed, but whether the article is an "export" at all. The present commodity falls within the general class of ships' stores, destined for consumption in transit without ever reaching a foreign port. The federal Supreme Court has left open the question whether local sales taxes may apply to the sale of oil as ships' stores of vessels in foreign commerce. (McGoldrick v. Gulf Oil Corp., 309 U.S. 414, 429 (1940).)

The constitutional words "import" and "export" are correlative and the definition of one closely affects the meaning of the other. Commencing with Brown v. State of Maryland, 25 U.S. (12 Wheat.) 419 (1827), a number of decisions define an import as an article brought into a port of the United States from a foreign country. (Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869); Arnold v. United States, 13 U.S. (9 Cranch) 104 (1815); Harrison v. Vose, 50 U.S. (9 How.) 372, 381 (1850); Mata v. United States, 19 Fed.2d 484, 486 (1927); American Sugar Refining Co. v. Bidwell, 124 Fed. 683, 686 (1903); Kidd v. Flagler, 54 Fed. 367 (1893); see, Powell, Note, 58 Harv.L.R. 858, 869.) If, as seems evident, the notion of an import implies a domestic port as a neces-

sary element, then the concept of an export connotes the commodity's ultimate destination in a foreign country for use or consumption. (See Dooley v. United States, 183 U.S. 154 (1901).) Neither, then, would cover goods consumed in the course of the voyage. The decisions most in point state that goods placed on a foreign-bound vessel to be consumed on board during the voyage are not exports. (Swan & Finch Co. v. United States, 190 U.S. 143, 144-145 (1903); West India Oil Co. v. Sancho, 108 F.2d 144, 147 (1939), aff'd on other grounds in West India Oil Co. v. Domenech, 311 U.S. 20 (1940); Kidd v. Flagler, supra, 54 Fed. at p. 369 (1893); Matson Navigation Co. v. State Board of Equal., supra 136 Cal.App.2d at p. 583; Schenley Distributors, Inc. v. State Tax Comm'r., 12 Atl.2d 638 (N.J. 1940).)

In Swan & Finch Co. v. United States, supra, a federal statute allowed a drawback or refund of previously paid import duties "on the exportation" of the commodity. The court held that the sale of ships' stores to vessels bound for foreign ports was not an exportation, stating: "Whatever primary meaning be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country." (190 U.S. at pp. 145-146.)

We conclude, then, that the vessel's fuel supply is not itself an "export" within the meaning of the constitutional provision. A more difficult question is whether the tax on the sale of fuel to propel the vessel and its cargo is the equivalent of an impost on the cargo. The import-export clause involves more than an exemption from taxes or imposts upon the goods. (Canton R. Co. v. Rogan, 340 U.S. 511, 514 (1951).) The immunity "runs to the *process of exportation* and the transactions and documents embraced in it." (Empresa Siderurgica v. Merced, supra, 337 U.S. at

p. 156.) Various indirect exactions may be the equivalent of a direct tax on the export commodity. A stamp tax on foreign bills of lading was nullified as the equivalent of a tax on the merchandise covered by the bills. (Fairbank v. United States, 181 U.S. 283 (1901).) A stamp tax on charter parties in foreign commerce has been invalidated, being "in substance a tax on the exportation; and a tax on the exportation is a tax on the exports." (United States v. Hvoslef, 237 U.S. 1, 17 (1915).) A stamp tax on insurance policies covering exports was rejected, being "as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves." (Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 27 (1915).)

On the other hand, an indirect exaction was sustained in Canton R. Co. v. Rogan, supra. There the taxpayer, a railroad, contested a state gross receipts tax measured in part by revenue from handling export goods and rental of dock-side loading facilities. Denying exemption, the court stated: "But the present tax is not on the articles of import and export; nor is it the equivalent of a direct tax on the articles . . . . The difference is that in the present case the tax is not on the *goods* but on the *handling* of them at the port. An article may be an export and immune from a tax long before or long after it reaches the port. But when the tax is on activities connected with the export or import the range of immunity cannot be so wide.

"To export means to carry or send abroad; to import means to bring into the country. Those acts begin and end at water's edge." (340 U.S. at pp. 513-515.)

The Canton Railroad decision left open the question whether a tax on stevedoring services might offend the import-export clause. (340 U.S. at p. 515.) Under the related interstate commerce clause, a local tax on the gross receipts

of stevedoring services has been prohibited as a tax on the privilege of engaging in interstate commerce, but a tax on the business of supplying stevedores sanctioned as an imposition on a local business. (Puget Sound Stevedoring Co. v. Tax Com., 302 U.S. 90 (1937); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947).)[3]

These decisions provide no beacon signaling taxability or immunity here. The problem is one of locating a radius of immunity within the larger circle of auxiliary activities culminating in export. The Hvoslef and Thames insurance cases, decided in 1915, emphasized the economic impact of the tax on the exportation process. The Canton Railroad case, decided 36 years later, demonstrates that a tax on export-connected activities is not void simply because it increases the cost of transportation, stressing instead the spatial relationship of the taxed activity to the physical flow of commodities. Applied as the only or the chief touchstone of immunity, each of these tests leaves something to be desired. Economic burden is not particularly trustworthy as a primary test, since a host of domestic exactions increases the cost of exportation as goods move from raw to manufactured state and from point of origin to commencement of the export voyage.[4] Spatial relationship between the journey and the tax incident is a mechanistic test which

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3. We mention without necessarily following City of Philadelphia Tax Review Bd. v. Norton, Lilly & Co., 189 Pa. Super. 91, 149 A.2d 672 (1959), which invalidated a gross receipts tax on a general steamship agent for steamships operating solely in foreign commerce, holding it offensive both to the commerce and the import-export clauses. See Comment, 73 Harv.L.Rev. 586 (1960).

4. See, for example, Empresa Siderurgica v. County of Merced, supra, 337 U.S. 154; Joy Oil Co. v. State Tax Com., 337 U.S. 286 (1949). The economic test was strongly criticized by Mr. Justice Black in his dissenting opinion in Richfield Oil Corp. v. State Board of Equal., 329 U.S. at pp. 87-89.

shunts constitutional objectives to one side. The physical distance from dockside to "water's edge" supplies little elbow room for a difference in constitutional treatment.

A third measurement, utilized in the Richfield Oil case, is the economic effect intended by the framers of the import-export clause. Article I, section 10, clause 2, was adopted at the Constitutional Convention at the insistence of the inland states; its objective, to prevent the seaboard states from levying exactions on national commerce with foreign nations as it flowed through those states. (See Richfield Oil Corp. v. State Board of Equal., supra, 329 U.S. at pp. 76-77; Farrand, *The Records of the Federal Convention of 1787* (1911), vol. II, p. 442; vol. III, p. 328; Note, Taxation Under the Import-Export Clause, 47 Colum.L.Rev. 490, 491 (1947).) In the related provision establishing congressional control of interstate and foreign commerce (art. I, sec. 8, cl. 3), room has been found for nondiscriminatory state taxation so that commerce may "pay its way." The import-export clause, in contrast, prohibits any tax, even a nondiscriminatory general levy applicable to all goods. The area of tax immunity established by the import-export clause is wider and more impervious than that of the interstate commerce clause. The two provisions are not "coterminous." (Richfield Oil Corp. v. State Board of Equal., supra, 329 U.S. at p. 75.)

By all three tests the present tax, applied to sales of fuel oil to foreign-bound ships, invades the core of immunity created by the import-export clause. Either as a result of business economics or state law, the retailer adds the amount of the sales tax to the invoice price of the fuel oil. (See Rev. & Tax. Code, sec. 6053.) In form the exaction is a gross receipts tax on the domestic retailer of oil. In

passing on the federal constitutionality of state taxes, the courts concern themselves "with the practical operation of the tax, that is, substance rather than form." (American Oil Co. v. Neill, 380 U.S. 451, 455, decided April 26, 1965.) In a constitutional sense and by economic result, the tax hits the consumer, in this case the operator of the vessel. (Richfield Oil Corp. v. State Board of Equal., supra, 329 U.S. at pp. 84-85; cf. Clary v. Basalt Rock Co., 99 Cal.App. 2d 458, 461-462 (1950); Roth Drug, Inc. v. Johnson, 13 Cal.App.2d 720, 736 (1936).) The occasion for the tax is the operator's purchase of fuel oil, a prime and indispensable necessity of the voyage. The tax does not hit some preliminary and distinct stage of the export process. It hits the ocean voyage itself, the very center and irreducible minimum of the export process. The vessel starts burning fuel oil "at water's edge" and does so all the way across the sea. The operator cannot move the vessel and its cargo to a foreign port without paying the cost of the levy which the state imposes upon the supplier. The cost is a cost of the ocean voyage, directly proportioned to the quantity of fuel and thus to the length of the voyage. The state imposes a greater economic burden on a voyage to Bombay than one to Panama. The state's hand reaches across the sea, the more sea the farther the reach. The economic burden of the state's exaction falls on the cargo, each item bearing a share proportioned in part to the distance of its transportation. The tax is nothing other than a levy on the ocean transportation of export cargo. By burdening a necessity of the voyage, the state erects an economic barrier to the movement of export cargo through California ports enroute to its foreign destination. This is precisely

the kind of economic barrier the import-export clause was designed to prevent.[5]

A related clause of the federal Constitution prohibits the states from imposing a duty of tonnage.[6] A duty of tonnage has been described as a charge for "entering or leaving a port." (United States v. Hvoslef, supra, 237 U.S. at p. 17.) The present exaction on the vessel operator is proportioned to the length of the voyage rather than the tonnage of the vessel; in terms of its interference with foreign commerce, it cannot be distinguished. (See Scandinavian Airlines System, Inc. v. County of Los Angeles, 56 Cal.2d 11, 34-35 (1961).)

It is possible, by a process of transposition, to cull from the interstate commerce decisions language to obscure the nature and impact of the present exaction. The state does not select export cargo as the target of economic burden, but levies a general, nondiscriminatory tax on all retailers, including the seller of oil, to support the services and protections which the state furnishes both seller and purchaser; the tax is not an impost on the voyage, but an excise levied on the retail business of the seller, a domestic business which bears only an incidental relationship to the export process; contemporary, enlightened judicial policy disfavors the creation of islands of immunity shielded from uniform and reasonable state taxation—such is the general

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5. Worthy of note at this point is Mr. Justice Jackson's statement in a separate opinion in Canton R. Co. v. Rogan, supra: "If the constitutional policy [of equal access to the high seas] can be avoided by shifting the tax from the exported article itself to some incident such as carriage, unavoidable in the process of exportation, then the policy is a practical nullity. I think prohibition of a tax on exports and imports goes beyond exempting specific articles from direct ad valorem duties—it prohibits taxing exports and imports as a process." (340 U.S. at p. 517.)

6. Article I, section 10, clause 3, provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage,. . . ."

doctrine sounded in the interstate commerce decisions. (See Northwestern States Portland Cement Co. v. Minn., 358 U.S. 450 (1959); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949); additional cases cited, Martin Ship Service Co. v. City of Los Angeles, 34 Cal.2d 793, 795-801 (1950).) The difference in character between the interstate commerce and the import-export clauses blocks any such transposition of doctrine. No implied qualification permitting general, nondiscriminatory levies can be read into the latter. (Richfield Oil Corp. v. State Board of Equal., supra, 329 U.S. at pp. 76-78.) The hard, obtrusive fact is that the dollar-and-cents burden of the present tax falls on the actual process of exportation, the ocean voyage to a foreign port.

We conclude that California cannot constitutionally apply its sales tax to fuel oil sold as ships' stores to vessels engaged exclusively in foreign commerce. The taxpayer is entitled to a refund of taxes to that extent. It is thus unnecessary to consider registry of the vessel as an independent determinant of taxability.

We turn to the sales involving vessels engaged in interstate commerce. The interstate commerce clause does not prevent the states from imposing nondiscriminatory taxes on activities essential to interstate commerce so long as the tax does not unduly burden that commerce. (See cases cited, Martin Ship Service Co. v. City of Los Angeles, supra, 34 Cal.2d at pp. 795-801.) The states may constitutionally impose a sales tax on gasoline and oil fuels used in interstate transport. (Eastern Air Transport, Inc. v. South Carolina Tax Com., 285 U.S. 147 (1932); Standard Oil Co. v. Johnson, 56 Cal.App.2d 411 (1942).) In holding that the interstate commerce clause did not bar a local gross receipts tax on a firm which loaded ships' stores, the Cali-

fornia Supreme Court made a statement which is no less applicable to sales taxation of ships' stores: "There is a clear distinction between the loading and transportation of commodities for shipment in interstate commerce and the loading of food and supplies to be consumed in the course of the journey. The loading of ships' stores, of food, fuel, and supplies, is comparable to the business of a ships' chandler (Puget Sound Stevedoring Co. v. Tax Com., 302 U.S. 90, 94 [58 S.Ct. 72, 82 L.Ed. 68]), or the sale and delivery of gasoline to be consumed in flight by an interstate air carrier. (Eastern Air Transport v. South Carolina Tax Comm., 285 U.S. 147, 153 [52 S.Ct. 340, 76 L.Ed. 673].) Whatever immunity might attach to the interstate carriage of cargo does not extend to the delivery of food and fuel for consumption on the carrier. (Eastern Air Transport v. South Carolina Tax Comm., supra.)" (Martin Ship Service Co. v. City of Los Angeles, supra, 34 Cal.2d at p. 802.)

Another horn to the interstate commerce argument is the assertion that the California tax unconstitutionally exposes interstate commerce to the burdens of multiple taxation. The taxpayer states that the California sales are exposed to taxation in the jurisdictions where the oil purchase contracts were made as well as at the home ports of the respective vessels. These are nothing but conjurations, abstractions evoking spectral possibilities. The taxpayer has not demonstrated the existence of any tax law subjecting the fuel oil to the property, sales or use taxes of another jurisdiction. The courts will not deal with such abstract possibilities. (General Motors Corp. v. Wash., 377 U.S. 436 (1964); American Airlines v. State Board of Equal., 216 Cal.App.2d 180, 193-194 (1963).)

Finally, the taxpayer contends that the federal Congress has "occupied the field" of taxation of fuel oil sold as

ships' stores, impliedly prohibiting state taxation. The taxpayer relies upon section 3451 of the Internal Revenue Code[7] and a related provision of the Tariff Act of 1930 (now appearing in 19 U.S.C., § 1309) permitting free withdrawal of imported commodities held in bond when sold as supplies to foreign vessels. In McGoldrick v. Gulf Oil Corp., supra, 309 U.S. 414, the Supreme Court invalidated a municipal sales tax on the sale of bunker oil manufactured in a bonded warehouse from imported crude oil and sold as ships' fuel in foreign commerce. The court pointed out that although the federal statutes were specifically designed to achieve an exemption from federal import taxation, the purpose of the exemption was to encourage importation of crude oil by assisting American refiners to meet foreign competition in the sale of oil as ships' stores. The court concluded that the municipal tax interfered with that policy objective, thus failing as an infringement of congressional regulation of commerce.

The statutes confronting the court in McGoldrick and the decision itself involved sales to foreign vessels of fuel oil refined from crude oil imported under bond. These statutes, their policy objective and the decision itself have no direct bearing on the problem of taxability remaining

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7. The present version of section 3451 is 26 U.S.C., section 4221. At the time of the sales here in question (1950) this provision was codified as 26 U.S.C., section 3451, and read as follows:

"Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under this chapter shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this chapter, if laden for use as supplies on such vessels, shall be held to be exported for the purposes of section 3430. . . ."

in this case, that is, sales of unbonded, domestically produced fuel oil sold to ships engaged in interstate, not foreign, commerce. At this point the taxpayer resorts by analogy to the tax restrictions on sales of ships' stores found in former section 3451 of the Internal Revenue Code (quoted in footnote 7, supra), arguing that a state sales tax on the transactions embraced by that section similarly interferes with congressional policy objectives.

Former section 3451 extended to ships' stores, including fuel, an exemption from taxation "under this chapter," that is, from taxes imposed by chapter 29 of the former Internal Revenue Code entitled "Manufacturers' Excise and Import Taxes."[8] The Attorney General points out that chapter 29 imposed no tax whatever on domestically produced crude oil or on fuel oil refined from it. Counsel for the taxpayer does not gainsay that fact. It follows that sales of domestic oil as ships' stores were completely outside the specific terms of former section 3451. To imply from this limited exemption a sweeping prohibition of state sales taxation on domestically produced ships' stores imputes to Congress an intent which would doubtless surprise and confound the framers of the legislation. Excerpts from the Congressional Record evince an intent to assist domestic sellers of ships' stores in meeting competition of suppliers at foreign ports. (77 Cong. Record (73d Cong. First Sess.) p. 3214.) Such a purpose has little connection with vessels engaged in intercoastal and coastwide trade, calling only at American ports. A statute so limited in its language and objectives cannot be stretched to "occupy the field" to the destruction of completely visible and constitutionally permissible forms of state taxation.

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8. That chapter is currently codified as chapter 32 of title 26, United States Code, and is entitled "Manufacturers Excise Taxes." Like its predecessor, 26 United States Code section 4221 confers exemption only from taxes imposed "under this chapter."

That portion of the judgment denying a refund of sales taxes on fuel oil supplied to vessels engaged in interstate commerce is affirmed. That portion of the judgment denying a refund of sales taxes on fuel oil supplied to vessels engaged exclusively in the export trade is reversed and the cause is remanded to the lower court for further proceedings consistent with this opinion.

FRIEDMAN J.

We concur:

PIERCE P.J.

REGAN J.

In the District Court of Appeal of the State of California in and for the Third Appellate District

[Sacramento]

3 Civ. 10953

Filed: Oct. 25 1965

Shell Oil Company, a Corporation,
Plaintiff and Appellant,
v.
State Board of Equalization of the State of California and the State of California,
Defendants and Respondents.

MODIFICATION OF OPINION and DENIAL OF PETITIONS FOR REHEARING

By the Court:

The typewritten opinion in the above-entitled matter filed in this court on September 28, 1965, is modified by substituting the phrase "in carriage of export cargo" for the phrase "in foreign commerce" appearing in the sixth line from the bottom of page 10 thereof.

Both petitions for rehearing are denied.

In the Supreme Court of the State of California
In Bank

SAC. 7576

Filed Jun 6 1966, William I. Sullivan, Clerk

Shell Oil Company,
Plaintiff and Appellant,
v.
State Board of Equalization et al.,
Defendants and Respondents.

The Shell Oil Company seeks a refund of taxes collected from it pursuant to the California Sales and Use Tax Law[1] based upon sales of bunker fuel oil to vessels engaged in interstate and foreign commerce. It contends that the tax is prohibited under the import-export and commerce clauses of the United States Constitution.

The import-export clause provides: "No State shall, without the Consent of Congress lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ." (U.S. Const., art. I, § 10, cl. 2.)

The commerce clause provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States. . . ." (U.S. Const., art. I, § 8, cl. 3.)

In addition to its foregoing contention, Shell also asserts that the tax is improper under section 6352 of the Revenue

1. Rev. & Tax. Code, § 6001 et seq. Section 6051 provides: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers . . . [and applied against] . . . the gross receipts . . . from the sale. . . ." Section 6052 states: "The tax hereby imposed shall be collected from the consumer insofar as it can be done."

and Taxation Code, which exempts from taxation the receipts from sales which the state is prohibited from taxing under the Constitution or laws of the United States or of California. We need not, of course, under the circumstances of this case consider this section independently of our consideration of the import-export and commerce clauses of the federal Constitution.

The vessels, to which the fuel here claimed to have been improperly taxed was sold and delivered, fall into three categories: ships registered in foreign countries and engaged in foreign commerce; ships registered in the United States and engaged in foreign commerce; ships registered in the United States and engaged in interstate commerce. As to all vessels engaged in foreign commerce, Shell contends that bunker fuel oil is itself an "export" within the meaning of the import-export clause and that the tax is thus an improper levy against the "process of exportation."

As to sales to vessels in any of the categories, Shell asserts that the tax exposes commerce to direct and multiple tax burdens prohibited by the commerce clause of the federal Constitution and that, even were this not so, the tax is precluded because Congress has impliedly occupied the field of taxation of bunker fuel oil sold as ships' stores.

The trial court rejected the foregoing contentions and upheld the tax as constitutional as applied to the sales in question. We are persuaded that the trial court has properly resolved the issues presented.

Under the import-export clause, a state may not impose a tax against an article of export if the article has commenced its movement abroad and the "certainty of the foreign destination is plain." (Richfield Oil Corp. v. State Board (1946) 329 U.S. 69, 82-83; Gough Industries v. State Bd. of Equal. (1959) 51 Cal.2d 746, 748-749; see United States v. Hvoslef (1915) 237 U.S. 1, 13.) In the *Richfield*

case oil was shipped to New Zealand with no portion of it being used or consumed in the United States. It was held at page 84 that California's sales tax could not constitutionally be applied, for oil was an export, and its delivery to the hold of the vessel was both "the incident which gave rise to the . . . tax [and] . . . a step in the export process."

The initial issue, therefore, is whether bunker fuel oil, sold for consumption by ships of foreign and domestic registry as they ply the oceans to foreign ports, can be characterized as an article of "export" within the meaning of the import-export clause. While the United States Supreme Court has left open the precise question of whether a "tax upon the sale of . . . oil as ships' stores to vessels engaged in foreign commerce is . . . an impost on . . . exports . . . prohibited by . . . the Constitution" (McGoldrick v. Gulf Oil Corp. (1940) 309 U.S. 414, 429), it and other courts have frequently stated that for an article to constitute an export within the meaning of the Constitution it must be intended for a destination in a foreign country. (See Alaska v. Arctic Maid (1961) 366 U.S. 199, 202; Richfield Oil Corp. v. State Board, *supra,* 329 U.S. 69, 83; Dooley v. United States (1901) 183 U.S. 151, 154-155.) For an article to constitute an import it must actually be brought into this country (Woodruff v. Parham (1868) 75 U.S. (8 Wall.) 123, 131), and it "is the logical sequence of the case of *Woodruff v. Parham,* that the word 'export' should be given a correlative meaning and applied only to goods exported to a foreign country." (Dooley v. United States, *supra,* 183 U.S. 151, 154.) Thus, as it would seem unlikely that articles placed abroad ship for use on that vessel during a voyage to the United States from a foreign land could be deemed imports (cf. Brown v. Maryland (1827) 25 U.S. (12 Wheat.) 419, 442), so it would seem equally unlikely that fuel or other consumables utilized during the voyage from the

United States to foreign shores could be classified as exports.

Shell relies upon infrequent language in some cases to the effect that because goods are intended for shipment out of the country, and not to return, they become exports. It has been stated that to export is merely to "carry or send abroad." (See Canton R. Co. v. Rogan (1951) 340 U.S. 511, 515; Matson Nav. Co. v. State Bd. of Equal. (1955) 136 Cal. App. 2d 577, 583.) A careful examination of these and other cases, however, demonstrates that to constitute an export, an article must not only be "sent abroad" but must be done so with "another country as the intended destination of the goods." (Matson Nav. Co. v. State Bd. of Equal., *supra,* 136 Cal. App. 2d 577, 583; see Richfield Oil Corp. v. State Board, *supra,* 329 U.S. 69, 83.)

In a situation involving a statutory "drawback" "on the exportation" of an article, the United States Supreme Court held that because oil consumed as ships' stores was not an export, the suppliers of the oil were not entitled to a refund of import duties paid upon the importation of the oil (Swan & Finch Co. v. United States (1903) 190 U.S. 143.) The court declared that "whatever primary meaning may be indicated by its derivation, *the word 'export' as used in the Constitution* and laws of the United States, generally means the transportation of goods from this *to a foreign country.* . . . '[E]xportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country' . . . . *It cannot mean simply a carrying out of the country,* for no one would speak of goods shipped by water from San Francisco to San Diego as 'exported,' although in the voyage they are carried out of the country. *Nor would the mere fact that there was no purpose of return justify the use of the word 'export.'* Coal placed on

a steamer in San Francisco to be consumed in propelling that steamer to San Diego would never be so designated. Another country or State as the intended destination of the goods is essential to the idea of exportation." (Swan & Finch Co. v. United States, *supra*, 190 U.S. 143, 144-145, *emphasis added;* cf. McGoldrick v. Gulf Oil Corp., *supra*, 309 U.S. 414, at p. 428.)

Shell next argues that at least with respect to ships of foreign registry, the fuel oil constituted an export at the time of delivery, because such vessels are "foreign territory" and the oil came within "foreign dominion" immediately upon delivery.

The concept that ships of foreign registry are foreign territory is a fiction upon which constitutional issues should not rest, even in part. (See Cunard S.S. Co. v. Mellon (1923) 262 U.S. 100; cf. Foppiano v. Speed (1905) 199 U.S. 501, 519-520.) Though "the statement [is] sometimes made that a merchant ship is a part of the territory of the country whose flag she flies . . . this, as has been aptly observed, is a figure of speech, a metaphor. . . . The jurisdiction which it is intended to describe . . . partakes more of the characteristics of personal than of territorial sovereignty. . . . It is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign. . . . [The assertion] that a ship is part of the territory of the country whose flag she carries . . . is a fiction. . . ." (Cunard S.S. Co. v. Mellon, *supra*, 262 U.S. at pp. 123-124; cf. Lauritzen v. Larson, (1953) 345 U.S. 571, 585.)

The logic of the *Swan* case applies equally to all vessels, regardless of the technicality of their registration. An article delivered to a vessel which flies a foreign flag cannot, for that reason alone, be deemed to have been received at

a foreign country or destination, and thus to become an "export" within the definitions promulgated by the United States Supreme Court.

While a vessel's fuel supply is thus not itself an export in the constitutional sense, nevertheless if a tax on the sale of the fuel is a tax on the "process of exportation" the tax would be unconstitutional. "[I]mmunity runs to the process of exportation and the transactions and documents embraced in it." (Empresa Siderurgica v. County of Merced (1949) 337 U.S. 154, 156.)

The process of exportation, for purposes of both the import-export clause and the prohibition against congressional levies upon exports from any state (U.S. Const., art. I, § 9, cl. 5), begins when goods are "committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State." (Coe v. Errol (1886) 116 U.S. 517, 525.) Once an article has entered upon the process of exportation, the process may no longer constitutionally be taxed by any governmental entity. (See, e.g., Empresa Siderurgica v. County of Merced, *supra*, 337 U.S. 154; Richfield Oil Corp. v. State Board, *supra*, 329 U.S. 69.)

In a number of cases, a tax has been held unconstitutional, though not levied upon *articles* of export, because the tax was "the equivalent of a direct tax on the articles." (Canton R. Co. v. Rogan, *supra*, 340 U.S. 511, 513.) In this category fall a federal stamp tax on foreign bills of lading (Fairbank v. United States (1901) 181 U.S. 283), a federal stamp tax on charter parties (United States v. Hvoslef, *supra*, 237 U.S. 1), and a stamp tax on policies of marine insurance covering export articles. (Thames & Mersey Ins. Co. v. United States (1915) 237 U.S. 19). The court in *Thames & Mersey* stated, at pages 25 to 27, that the question was

whether the "tax upon [the insurance policies is] so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation. . . . The answer must be found in the actual course of trade. . . . It cannot be doubted that insurance during the voyage is . . . an integral part of the exportation. . . . The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation . . . is as much a burden on exporting as if it were laid on the . . . goods themselves. Such taxation does not deal with . . . distinct or separable subjects; the tax falls upon the exporting process."

Taken literally, the quoted passage might seem to require, as Shell claims, the invalidating of a tax on any product, process or service somehow related to and necessary for exportation. The acceptance of such a contention would "lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined." (Canton R. Co. v. Rogan, *supra,* 340 U.S. 511, 515.) Such a broad and all-embrasive interpretation of the export clause has never been accepted. (See, e.g.; Canton R. Co. v. Rogan, *supra,* 340 U.S. 511; Empresa Siderurgica v. County of Merced, *supra,* 337 U.S. 154; Joy Oil Co. v. State Tax Commission (1949) 337 U.S. 286; Peck & Co. v. Lowe (1918) 247 U.S. 165; Cornell v. Coyne (1904) 192 U.S. 418; Pittsburgh etc. Coal Co. v. Bates (1895) 156 U.S. 577; Coe v. Errol, *supra,* 116 U.S. 517.) In the *Canton* case a tax measured in large part by the gross receipts of a common carrier of export freight in the port city of Baltimore was upheld against import-export clause challenges. So, too, the court sustained a tax on operations involving freightage of export goods to the port. (Western Maryland R. Co. v. Rogan, (1951) 340 U.S. 520.)

Those cases wherein taxes have been successfully challenged involved taxes so closely related to particular articles

of export that they may be characterized as the "equivalent of a direct tax on the articles." (Canton R. Co. v. Rogan, *supra*, 340 U.S. 511, 513; United States v. Hvoslef, *supra*, 237 U.S. 1; Thames & Mersey Ins. Co. v. United States, *supra*, 237 U.S. 19.) *A sales tax levied against bunker fuel oil sold to a carrier vessel, however, is not related in any manner to the articles of export which the vessel may carry. The tax does not vary with the volume or value of the export articles.* (See Crew Levick Co. v. Pennsylvania (1917) 245 U.S. 292, 297-298.) The amount of tax depends on the amount of fuel purchased; it will vary with the distance to be navigated, and will be imposed without regard to whether the vessel is burdened with export cargo. "[T]he tax is not on the *goods*" shipped as exports (Canton R. Co. v. Rogan, *supra*, 340 U.S. 511, 514) but on the fuel used to further the transportation of such goods, a "distinct or separable subject" (Thames & Mersey Ins. Co. v. United States, *supra*, 237 U.S. 19, 27), which may be taxed. "An article may be an export and immune from tax long before or long after it reaches the port. But when the tax is on activities connected with the export or import the range of immunity cannot be so wide." (Canton R. Co. v. Rogan, *supra*, 340 U.S. 511, 514-515; cf. Martin Ship Service Co. v. City of L.A. (1950) 34 Cal.2d 793.) Nor is the tax on the voyage itself; it is imposed on the *sale* of oil, not on its *use* in foreign commerce. (Cf. Eastern Air Transport Inc. v. South Carolina Tax Comm. (1932) 285 U.S. 147, 152-153.)

The contention that sales of fuel oil may properly be taxed under the import-export clause is re-enforced by a consideration of the cases decided under the commerce clause. The commerce clause and the import-export clause are by no means "coterminous"; while no tax whatever may be imposed directly against exports, the commerce

clause has been interpreted so as to accommodate state powers by upholding taxes "designed to make interstate commerce bear a fair share of the cost of the local government . . . and by invalidating those which discriminate against interstate commerce, which . . . place an undue burden on it. . . , [T]he two clauses, though complimentary, serve different ends. And the limitations of one cannot be read into the other." (Richfield Oil Corp. v. State Board, *supra,* 329 U.S. 69, 75-76.) *Yet when we go beyond the questions of fair burden, or of discrimination, and look to the basic principles, the cases decided under the commerce clause are of obvious relevance in considering issues to be determined under the import-export clause.* It is difficult to understand how the tax imposed on the sale of bunker fuel oil could be considered to infringe on the process of exportation under the import-export clause, and yet be so unrelated to the processes of interstate commerce as not to constitute any burden on such commerce within the meaning of the commerce clause.

The Supreme Court has determined that " 'It is elementary' . . . 'that a State may tax property used to carry on interstate commerce'. . . . [T]he mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a nondiscriminatory tax imposed by the State upon intrastate dealers." (Eastern Air Transport Inc. v. South Carolina Tax Comm., *supra,* 285 U.S. 147, 152-153.) In *Eastern Air* the tax was imposed against the sale of fuel to interstate carriers when they were stopped at local airports. Although characterizing the tax as a "license tax," the court concluded at page 152 that even if "such a license tax for the privilege of making sales within the State were regarded as in effect a tax upon the goods sold, its validity could not be so questioned . . . although the property might actually

be used in interstate commerce." The tax in question, the court further held, could not be distinguished from taxes held valid and imposed upon the sale of fuel to railroad carriers in interstate commerce, or upon the vehicles of carriage themselves. (See also, Nathan v. Louisiana (1850) 49 U.S. (8 How.) 73, 80-81; Edelman v. Boeing Air Transport, Inc. (1933) 289 U.S. 249, 252; Martin Ship Service Co. v. City of L.A., *supra*, 34 Cal.2d 793, at p. 799.)

For the foregoing reasons we conclude that the instant tax is "a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation. . . ." (Turpin v. Burgess (1886) 117 U.S. 504, 507.) *As a tax levied upon a subject related to but nevertheless distinct and separable from articles of export,* the tax does not violate the import-export clause of the federal Constitution under the facts of the instant case.

The taxpayer next asserts that the sales "involve" interstate commerce, because contracts were executed and payments made outside California, and that all of the sales to vessels are exposed to multiple tax burdens. (See Gwin, Etc., Inc. v. Henneford (1938) 305 U.S. 434.)

Within prohibited areas of state taxation of interstate commerce is a tax on the *use* of fuel as an instrumentality of interstate commerce, in interstate commerce. (Helson and Randolph v. Kentucky (1929) 279 U.S. 245.) But a sales tax imposed generally upon purchases made locally for purposes of consumption is permissible, although the goods had just traveled in interstate commerce. (McGoldrick v. Berwind-White Co., (1940) 309 U.S. 33.) And a tax may be levied upon an intrastate transaction though the article sold or delivered is to be forthwith shipped out of the state. (Dept. of Treasury v. Wood Corp. (1941) 313 U.S. 62, 68.) Directly in point, of course, is the decision of the court upholding the tax on the sale of fuel to airplanes in inter-

state commerce, discussed above with reference to the import-export clause. (Eastern Air Transport v. South Carolina Tax Comm., *supra,* 285 U.S. 147.) In that case the court pointed out that even were the tax to be considered as levied directly upon the goods sold, "that aspect [of] the tax would be upon a part of the general mass of property within the state and hence subject to the state's authority to tax, although the property might actually be used in interstate commerce." (Eastern Air Transport v. South Carolina Tax Comm., *supra,* 285 U.S. 147, 152.) A state may also "validly tax the 'use' to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of . . . planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. . . . '[so long as the tax] falls short of a tax directly imposed on its use in interstate commerce.' . . ." (Edelman v. Boeing Air Transportation, *supra,* 289 U.S. 249, 252.)

The tax imposed on the sales of fuel in the instant case was not an unconstitutional burden under the commerce clause, for "a non-discriminatory tax upon local sales . . . has never been regarded as imposing a direct burden on interstate commerce" (Eastern Air Transport v. South Carolina Tax Comm., *supra,* 285 U.S. 147, 153; Henneford v. Silas Mason Co. (1937) 330 U.S. 577, 582-583), "notwithstanding that [the] ultimate function [of the fuel] is to generate motive power for carrying on interstate commerce." (Edelman v. Boeing Air Transportation, *supra,* 289 U.S. 249, 252.)

The taxpayer further asserts that because of the fiction of the territoriality of vessels and because of the home port doctrine of Hays v. The Pacific Mail Steamship Co. (1854) 58 U.S. (17 How.) 596, the vessels here involved are subject to taxation by the state or country of their registry,

and that therefore the tax is unconstitutional because the sale might be exposed to multiple burdens. This contention is also without merit.

First, there is no basis, in reality, for the fiction that the ships were foreign territory and that delivery of the fuel oil took place in a state or country outside California. Thus, even though the home port is the situs of the vessels for purposes of the levy of a property tax (see Hays v. The Pacific Mail Steamship Co., *supra,* 58 U.S. 596), there is no ground under which other states could impose a tax on the identical transactions consummated in California, without violating the commerce and due process clauses of the Constitution. (Freeman v. Hewit (1946) 329 U.S. 249; Miller Bros. Co. v. Maryland (1954) 347 U.S. 340; McLeod v. Dilworth Co. (1944) 322 U.S. 327.) For the foregoing reason the Supreme Court was not troubled by any imagined problems of multiple taxation in the *Edelman* and *Eastern Air* cases where taxes nearly identical to the tax imposed by California in the instant case were upheld. As to the vessels registered abroad, Shell has failed to demonstrate that it has ever been the concern of any United States jurisdiction in construing the commerce clause that a foreign country might arbitrarily impose a tax on sales in the United States to one of its citizens, or to ships carrying its flag. In asserting that California may not tax such sales Shell's argument "erroneously attributes to such taxation the risk of discrimination. Actually it is attributable to the freedom of foreign countries, not permitted to our own states, to adopt rules of their own that can result in multiple burdens. The court cannot prevent foreign countries from taxing instrumentalities of foreign commerce owned by their domiciliaries. . . . It is without power to compel independent nations to adopt a uniform nondiscriminatory system of taxation. It does not follow that the states must forego the

power to impose taxes that are not in themselves discriminatory." (Scandinavian Airlines System Inc. v. County of Los Angeles (1961) 56 Cal.2d 11, 44-45, Traynor, J., dissenting.)

Moreover, even were it true that the sale in California could be taxed by the state of the vessel's registry, or that taxes levied by a foreign country were a concern of the courts in determining the validity of a state tax under the commerce clause, appellant has failed to demonstrate that the sale is in fact subject to multiple burdens. The abstract possibility that duplicative taxes might be levied by another jurisdiction against the identical transactions, is not the concern of the courts in determinations made under the commerce clause. "'[T]axpayers must show that the formula places a burden upon interstate commerce in a constitutional sense.' Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax. . . . And further, it has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales. In such cases we have refrained from passing on the question of 'multiple taxation,' . . . and we adhere to that position." (General Motors Corp. v. Washington (1964) 377 U.S. 436, 449; see Southern Pac. Co. v. Gallagher (1939) 306 U.S. 167, 172.)

The taxpayer finally contends that Congress, in enacting certain statutes, has "occupied the field" of taxation of fuel oil sold as ships' stores, and thus impliedly precluded state taxation of such commodities.

"There seems little doubt . . . that under its power over interstate commerce, Congress can fix the bounds of state taxation of that commerce." (Hartman, *State Taxation of Corporate Income,* 13 Vand.L.Rev. 21, 122 (1959); see

McGoldrick v. Gulf Oil Corp., *supra*, 309 U.S. 414; cf. Michigan-Wisconsin Pipe Line Co. v. Calvert (1954) 347 U.S. 157, 165-166.) Although there has been little direct discussion of the limits of federal preclusion with respect to the area of *taxation*, the rules are fairly clear in the area of *regulation* of commerce. When there is a direct conflict between state and federal statutes, or if the subject demands uniformity of regulation, the state statute must fall; the question of implied prohibition, however, is another matter. (See Kelly v. Washington (1937) 302 U.S. 1, 9.)

An issue of implied prohibition arises when a federal act impinges on subject matter which a state statute attempts also to regulate, even though there is no direct contradiction between the enactments. "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field . . . is not forbidden or displaced. . . . [T]he exercise by the State of its police power . . . . is superseded only where the repugnance of conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" (Kelly v. Washington, *supra*, 302 U.S. 1, 10.) The intent to occupy the field is "'. . . . not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.'" (Huron Cement Co. v. Detroit (1960) 362 U.S. 440, 443.) There is no reason to believe that the rule as to the implied occupation of the field of taxation is any more strict; it would indeed be difficult to contend that if Congress has taxed a particular item it thereby precludes a state levy against the same item.

Appellant relies in part upon section 3451 of the Internal Revenue Code which, at the time of the sales here in ques-

tion, read, as pertinent: "Under regulations prescribed . . . no tax under this chapter shall be imposed upon any article sold for use as fuel supplies, ships' stores . . . or legitimate equipment on vessels . . . actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States. . . . *Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this chapter, if laden for use as supplies on such vessels, shall be held to be exported for purposes of section* 3430. . . ." The chapter referred to in section 3451 (Chapter 29 of the Internal Revenue Code of 1939) was entitled "Manufacturers' Excise and Import Taxes"; section 3422 of that chapter imposed a tax upon the importation of petroleum and upon fuel oil and other products derived from such imported petroleum. Additionally, relevant provisions of the Tariff Act of 1930 provide that withdrawals under certain regulations from customs bonded warehouses or internal revenue bonded warehouses of supplies manufactured from certain imported oil and delivered for use by vessels and aircraft engaged in foreign trade are to be exempt from customs duties and internal revenue tax. (19 U.S.C., § 1309.)

In McGoldrick v. Gulf Oil Corp., *supra,* 309 U.S. 414, the Supreme Court held exempt from a sales tax levied by New York City deliveries of fuel oil refined from crude petroleum imported and confined to warehouses under bond as provided for under the above statutes and the federal regulations made pursuant thereto. The court pointed out at pages 425 and 426 that "From the time of importation until . . . laden on vessels engaged in foreign trade, the imported petroleum and its product, the fuel oil, is segregated from the common mass of goods and . . . is subject to the supervision and control of federal customs officers." The court

made it clear that the oil remained separate from the mass of property subject to the tax upheld under the commerce clause in McGoldrick v. Berwind-White Co., *supra,* 309 U.S. 33.

The court determined that the statutes and multiple regulations involved in *Gulf Oil* represented a comprehensive regulation of *imported oil.* The enactments, including customs regulations specifically exempting imported goods in bonded warehouses from state taxation and deemed incorporated by reference into the Tariff Act of 1930, ". . . afford a comprehensive scheme for the regulation of the *importation* of the crude petroleum and of its control while in the course of manufacture in bond into fuel oil and its delivery as ships' stores. . . ." The local tax conflicted with congressional policy, for "Congress *provided for the segregation of the imported merchandise*" in furtherance of the purpose of relieving the *"importer of the import tax* so he might meet foreign competition in the sale of fuel as ships' stores." (Pp. 426-428, *emphasis added.*)

The *Gulf Oil* case demonstrates that Congress intended to occupy only a limited field outside of which state regulations are not forbidden or displaced. (See Kelly v. Washington, *supra,* 302 U.S. 1, 9.) It is clear that the *statutes invoked by Shell as construed in Gulf Oil do not purport to limit even the right of the federal government to levy taxes on sales of domestically produced fuel oils from ordinary stocks,* and certainly they are too circumscribed in their language and purpose to be deemed to occupy the field or conflict with the California sales tax imposed against the sales in the instant case.

The taxpayer has thus failed to demonstrate the invalidity of the tax in any respect. Accordingly, the judgment is affirmed.

PEEK, J.

We Concur:
TRAYNOR, C. J.
PETERS, J.
TOBRINER, J.
BURKE, J.
*WHITE, J.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

CONCURRING AND DISSENTING OPINION

I would reverse that portion of the judgment denying a refund of sales taxes on fuel oil sold as ships' stores to vessels engaged exclusively in the export trade, for the reasons expressed by Mr. Justice Friedman in the opinion prepared by him for the District Court of Appeal in Shell Oil Co. v. State Board of Equalization (Cal.App.) 46 Cal. Rptr. 653.

In all other respects I would affirm the judgment.

McComb, J.

Appendix B

California Revenue and Taxation Code

"Section 6051—Levy on Retailers' Gross Receipts; Rate

"For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter. (Added Stats. 1941, c. 36, p. 536, § 1, as amended Stats. 1943, c. 357, p. 1581, § 1; effective May 7, 1943; Stats. 1943, c. 1004, p. 2918, § 1, effective June 3, 1943; Stats. 1945, c. 646, p. 1292, § 3, effective June 5, 1945, operative July 1, 1945; Stats. 1947, c. 780, p. 1866, § 3, effective June 17, 1947; Stats. 1948, c. 12, p. 16, § 3, effective April 9, 1948.)"

"Section 6052—Collection by Retailer From Consumer

"The tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done. (Added Stats. 1941, c. 36, p. 536, § 1.)"

"Section 6352—Property Exempted by Constitution or Federal Law

"There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State. (Added Stats. 1941, c. 36, p. 540, § 1.)"

19 U.S.C. 1309

"Supplies for Certain Vessels and Aircraft—Exemption from Customs Duties and Internal-Revenue Tax

"(a) Articles of foreign or domestic origin may be withdrawn, under such regulations as the Secretary of the Treasury may prescribe, from any customs bonded warehouse, from continuous customs custody elsewhere than in a bonded warehouse, or from a foreign-trade zone free of duty and internal-revenue tax, or from any internal-revenue bonded warehouse, free of internal-revenue tax—

"(1) for supplies (not including equipment) of (A) vessels or aircraft operated by the United States, (B) vessels of the United States employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions, or between Hawaii and any other part of the United States; or

". . . .

"(b) Articles withdrawn from bonded warehouses, bonded manufacturing warehouses, continuous customs custody elsewhere than in a bonded warehouse, or from a foreign-trade zone, and articles of domestic manufacture or production, laden as supplies upon any such vessel or aircraft of the United States or laden as supplies (including equipment) upon, or used in the maintenance or repair of, any such foreign vessel or aircraft, shall be considered to be exported within the meaning of the drawback provisions of this chapter . . ." (As amended)."

26 U.S.C. 3451

"Exemption from Tax of Certain Supplies for Vessels

"Under regulations prescribed by the Commissioner, with

the approval of the Secretary, no tax under this chapter shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this chapter, if laden for use as supplies on such vessels, shall be held to be exported for the purposes of Section 3430." (Now 26 U.S.C. 4222, as amended, c. 736, 68A, Stat. 495 (1954)).